

Appeal of a decision by the District Manager, California Desert District Office, Bureau of Land Management, declaring communication site right-of-way terminated for failure to pay rent, requiring payment of back rent, and giving notice to remove facilities and equipment. CARI 4722.

Affirmed as modified.

1. Administrative Procedure: Decisions—Res Judicata—Rules of Practice: Appeals: Failure to Appeal

The doctrine of administrative finality (the administrative equivalent of res judicata) precludes reconsidering a decision when the party (or a predecessor-in-interest) had an opportunity to obtain review within the Department and no appeal was taken, or an appeal was taken and the decision was affirmed, except upon a showing of compelling legal or equitable reasons, such as violations of basic rights of the parties or the need to prevent an injustice.

2. Communication Sites—Federal Land Policy and Management Act of 1976: Rights-of-Way—Rights-of-Way: Act of March 4, 1911—Rights-of-Way: Nature of Interest Granted

Under the regulatory system in effect in 1975, a right-of-way authorized the use or uses it specified and construction of the buildings and structures identified in an application. A right-of-way holder wishing to change the approved use of a site, use it for additional purposes, or construct additional facilities was required to file an application to amend the authorization. After repeal of the Act of Mar. 4, 1911, BLM did not have authority to modify a previously issued grant to allow a use not previously authorized. BLM's authority to amend a prior grant to change use, grant a right to use additional land, or to authorize construction was thereafter governed instead by Title V of FLPMA.

3. Communication Sites–Rights-of-Way: Act of March 4, 1911–Rights-of-Way:
Nature of Interest Granted

The regulation at 43 C.F.R. § 2802.1-7(e) (1976) continues to apply to a right-of-way which was issued under the Act of Mar. 4, 1911, after revision of the regulation in 1954. The regulation does not apply when a right-of-way has been conformed to FLPMA.

4. Communication Sites–Federal Land Policy and Management Act of 1976: Rights-of-Way–Rights-of-Way: Cancellation

Pursuant to FLPMA and its implementing regulations, a right-of-way may be terminated for failure to pay rent when the past due rent has not been paid 30 days after notice has been given to the holder of the right-of-way. A hearing is not required.

5. Communication Sites–Federal Land Policy and Management Act of 1976: Rights-of-Way–Rights-of-Way: Appraisals

The holder of a right-of-way under FLPMA is entitled to be notified of a decision establishing a rental rate, provided a copy of the appraisal, and given an opportunity to appeal.

APPEARANCES: Lawrence A. McHenry, Esq., Phoenix, Arizona, for Appellant.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Philip L. Angell (d.b.a. Platronics Communications) has appealed a December 8, 1994, decision by the District Manager, California Desert District Office, Bureau of Land Management (BLM), declaring communication site right-of-way grant CARI 4722 terminated for failure to pay rent, requiring payment of back rent, and giving notice to remove facilities and equipment from the site. Appellant has requested a stay of the decision pending review of the appeal.

The site at issue is located on Rodman Mountain within the NE¹/₄NE¹/₄ sec. 2, T. 6 N., R. 3 E., San Bernardino Meridian, California. Right-of-way grant R-4722 was issued to Channel 13 of Las Vegas, Inc., for 50 years effective October 14, 1975, under the Act of March 4, 1911, ch. 238, 36 Stat. 1235, 1253 (1911), codified as amended at 43 U.S.C. § 961 (1988), repealed, Pub. L. No. 94-579, § 706(a), 90 Stat. 2743, 2793 (1976). The grant authorized use of a 20- by 20-foot parcel (0.009 acre) as a microwave transmission site. Rental was established by appraisal at \$1,200 per year. By decision dated June 10, 1982, BLM approved assignment of the right-of-way to Alfa Broadcasting Company of Las Vegas, Nevada (KTNV). By letter dated August 28, 1985, BLM notified KTNV that the rental had been reappraised at \$1,850 per year effective the next anniversary date.

Appellant applied for assignment of the right-of-way on August 15, 1988. Letters and memoranda in the case file indicate that, prior to approval of the assignment, he constructed an antenna with guy wires extending outside of the authorized area and began using the site. In its letter of December 2, 1988, BLM confirmed the details of an October 24, 1988, meeting between Appellant and a BLM realty specialist regarding the application for assignment. Therein, the Area Manager stated:

I want to emphasize that no change in operation, new construction, or the addition of new equipment is allowed on public lands without a right-of-way or right-of-way amendment signed by the authorized officer. Such actions will be considered knowing and willful trespasses against the United States.

On January 27, 1989, Appellant filed an application to amend. By letter dated February 6, 1989, BLM informed him that the assignment could not be issued until the trespass was resolved and that, pending an appraisal, he would be charged an estimated rental of \$5,000 per year beginning October 1, 1988. BLM also notified Appellant that "a new right-of-way grant assigning R-4722 to you has been drafted" which would:

1. Assign right-of-way R-4722 to Platronics Communications and authorize use of a two-way radio communications site 25 feet by 30 feet on Rodman Mountain.
2. Convert the right-of-way's authority to Title V of the Federal Land Policy and Management Act [(FLPMA) 43 U.S.C. §§ 1761-1771 (1994)].

Appellant paid the back rent due, and by decision dated April 21, 1989, BLM held the trespass settled and the case closed. By letter dated April 24, 1989, BLM sent Appellant stipulations to the assignment for his signature, again informing him of the estimated rental of \$5,000 per year and stating the assignment would:

"1) Assign right-of-way R-4722 to Platronics Communication and authorize use of a two-way radio communication site 25' x 30' on Rodman Mountain [; 2) Convert the right-of-way authority to Title V of FLPMA[; and] 3) Revise the stipulations to the current Bureau wording." Appellant signed the stipulations on May 1, 1989. By decision dated May 5, 1989, BLM assigned R-4722 to Appellant, approved its amendment to a 25- by 30-foot site for use for two-way radio communication, and conformed it to Title V of FLPMA and the regulations promulgated thereunder.

In January 1991, Appellant filed an "alternate" or "supplemental" amendment requesting an additional area 25 by 30 feet and proposing to add 40 feet to the existing tower, a new 60-foot tower, two portable steel buildings, a generator, a liquid petroleum storage tank, a security fence, and a parking area. On November 24 and 25, 1992, Appellant filed an application for a new right-of-way with both the California Desert District and the Barstow Resource Area offices. The proposal sought to add

eight portable steel buildings, a 160-foot tower, a generator, a liquid petroleum storage tank, a security fence, a new access road and parking area, and encompass approximately 6,000 square feet of additional ground. The accompanying supplemental statement noted that the application was "intended to replace the application for amendment filed JANUARY 30, [sic] 1989."

On January 27, 1994, the District Manager for the California Desert District issued Appellant a notice to show cause why his right-of-way should not be cancelled. It stated that BLM had previously sent Appellant a bill for collection for \$10,000 for past due rentals for 1992 and 1993 which had not been paid. With the notice, BLM enclosed an updated bill for collection for \$15,000, which included the rent due for 1994. BLM allowed 30 days from receipt to submit payment and respond to the notice. The case file does not indicate that Appellant responded; nor does it reveal why BLM did not act on its notice prior to issuance of the December 8, 1994, decision appealed herein. The case file does however disclose that BLM ascertained that Appellant had paid the \$5,000 estimated annual rental for 1992. Also, based on an appraisal dated February 3, 1994, BLM determined that the fair market rental value of each of eight communication sites on Rodman Mountain is \$6,800 per year. In accord with the appraisal, the decision on appeal states that Appellant owes \$13,600 for the years 1993 and 1994 and an additional \$6,900.44 for 9 months of 1989 and the years 1990 through 1992.

On appeal, Appellant contends that he should hold his right-of-way site as an assignee of a "1911 Act" grant. 1/ His notice of appeal

1/ The "1911 Act" was a provision in an appropriations bill for the Department of Agriculture. 36 Stat. 1235, 1253 (1911). It authorized granting rights-of-way for, among other matters, telephone and telegraph usage, but made no provision for radio, television, or other forms of electronic communication. As amended in 1952, the Act stated in relevant part:

"[T]he head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights-of-way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands * * * for poles and lines for communications purposes, and for radio, television, and other forms of communication transmitting, relay, and receiving structures and facilities, * * * not to exceed four hundred feet by four hundred feet for radio, television, and other forms of communication transmitting, relay and receiving structures and facilities, to any citizen, association, or corporation of the United States, where it is intended by such to exercise the right-of-way herein granted for any one or more of the purposes herein named * * *."

Pub. L. No. 367, 66 Stat. 95 (1952), codified at 16 U.S.C. §§ 5, 420, 523 (1988) and 43 U.S.C. § 961 (1988). Both the original and amended versions were repealed "insofar as they apply to the issuance of rights-of-way over, upon, under, and through the public lands" by FLPMA. 90 Stat. 2743, 2793 (1976).

asserts that the decision to conform the right-of-way to Title V "without the request or consent of the holder is a violation of Statute and regulations and should be rescinded and replaced by the original 1911 Act easements." (Notice of Appeal at 2.) Similar statements that the right-of-way could not be conformed to Title V without his "request or consent" appear in his statement of reasons (SOR) (SOR at 2-5) and underlie the arguments he raises. In summary, Appellant contends that BLM erred "when it combined Appellant's request for assignment approval and Appellant's request for amendment" (SOR at 7); that the regulations in effect when the grant was issued "are controlling and should have been used by BLM" (SOR at 5); that "[a] holder of a 1911 Act grant can change communication uses that are permitted under the Act without applying for and receiving approval from the BLM" (SOR at 7); that "his rental upon assignment and approval of the easement does not change from that imposed and fixed upon the original holder" (SOR at 8); that BLM "cannot retroactively charge rents on 1911 grant easements" (SOR at 9); and that, "[u]nder the regulations in effect at the time of the grant," he "has a right to a hearing before termination of his easement" and the hearing must be held by the Office of the Secretary or the Office of Hearings and Appeals. Id.

Appellant's position is based upon three fundamental errors. First, he overlooks the fact the decision conforming R-4722 to FLPMA was issued in 1989 and may not be challenged in this appeal. Second, he fails to recognize both the circumstances and change in the law which precluded transfer of the right-of-way to him under the 1911 Act. Third, assuming Appellant were assigned R-4722 under the 1911 Act, he is mistaken as to rights he would have.

[1] The record establishes that Appellant was twice notified that R-4722 would be conformed to Title V of FLPMA and did not submit any response objecting to the proposed action. Most importantly, the last paragraph of BLM's May 5, 1989, decision issuing the right-of-way informed Appellant:

Within 30 days of receipt of this decision, you have the right of appeal to the Board of Land Appeals, Office of the Secretary, in accordance with the regulations at 43 C.F.R. § 4.400. If an appeal is taken, you must follow the procedures outlined in the enclosed Form 1842-1, Information on Taking Appeals to the Board of Land Appeals. The appellant has the burden of showing that the decision appealed from is in error.

Appellant did not appeal that decision, and at the end of the 30-day period it became final.^{2/} By not challenging BLM's decision conforming his

^{2/} At the time the decision was issued, 43 C.F.R. § 4.21(a) provided that a decision was not effective during the time which a notice of appeal could be filed and that the filing of a notice of appeal would suspend the decision from taking effect. 36 Fed. Reg. 7186 (Apr. 15, 1971). The regulation was subsequently revised. 58 Fed. Reg. 4939 (Jan. 19, 1993).

right-of-way to Title V, Appellant, as a matter of law, consented to it.^{3/} Indeed, the earliest indication that Appellant was dissatisfied with BLM's decision is a letter dated October 14, 1992, requesting that the decision be set aside and the right-of-way restored to the 1911 Act. The finality of BLM's decision however is sufficient reason to reject the arguments Appellant raises in this appeal. The doctrine of administrative finality, the administrative equivalent of res judicata, precludes reconsidering a decision "when the party, or a predecessor in interest, had an opportunity to obtain review within the Department and no appeal was taken, or an appeal was taken and the decision was affirmed," except "upon a showing of compelling legal or equitable reasons, such as violations of basic rights of the parties or the need to prevent an injustice." Turner Brothers, Inc. v. OSMRE, 102 IBLA 111, 121 (1988); see Laguna Gatuna, Inc., 131 IBLA 169, 172 (1994); Melvin Helit v. Gold Fields Mining Corp., 113 IBLA 299, 308-09, 97 I.D. 109, 114 (1990). Appellant has not argued that the exception applies and we see no reason to invoke it.

[2] Even if Appellant's arguments were subject to review in this appeal, they offer no basis for changing BLM's 1989 decision because they fail to acknowledge of initiation of use and occupancy before the segregation and withdrawal: "Without crediting a source, the field examination report, dated March 30, 1983, states that '[b]erry picking began 1958.' No additional evidence was received." (Motion at 2.) The State filed notice that it did not oppose BLM's Motion. Nothing was filed by or on behalf of John. By Order dated July 29, 1993, the Board vacated BLM's July 1992 Decision and remanded the case "for further appropriate action." We did not, however, accede to the invitation to specify whether the case should be closed or BLM should undertake further adjudication.

On remand, the State Office issued its March 7, 1994, Decision, the subject of the instant appeal, in which it was concluded that, in the absence of a timely appeal from the December 1972 Decision, BLM had properly rejected John's Native Allotment Application. More particularly, the Decision articulated the following rationale:

On December 4, 1972, the authorized officer may require the filing of an amended application in accordance with § 2802.1 wherein the authorized officer's judgment the deviation is substantial.

^{3/} Appellant's brief purports to quote from a BLM letter advising him that "two additional conditions would have to be met prior to any assignment." (SOR at 2.) The quoted language does not appear in any letter in the case file. Despite Appellant's suggestions, the question is not whether BLM could unilaterally change the terms of the prior grant. Consistent with other law governing such matters, FLPMA allows BLM to terminate a prior grant and reissue it, or modify it to be subject to FLPMA, when such action is undertaken "with the consent of the holder thereof." 43 U.S.C. § 1769(a) (1988) (emphasis supplied). Given BLM's notices to Appellant and his opportunity to appeal the decision, his frequently repeated assertion that he must have requested the grant be conformed to FLPMA before BLM could act is not compelling.

43 C.F.R. § 2802.2-4 (1976); see 43 C.F.R. §§ 2801.1-1(g), 2803.2(b), and 2803.6-1(a). ^{4/} A right-of-way holder wishing to change the approved use of a site, use it for additional purposes, or construct additional facilities was required to file an application to amend the authorization. See Tucson Electric Power Co., 113 IBLA 327, 331-32 (1990); American Telephone & Telegraph Co., 32 IBLA 338, 339 (1977). A party seeking an assignment of a previously issued grant was required to provide the same information as an initial applicant. 43 C.F.R. § 2802.4-1 (1976); see also 43 C.F.R. §§ 2803.6-1(b), 2803.6-3 (1976) (applicable to Appellant's application).

Thus, Appellant is mistaken in his assertions that under the 1911 Act he "has a right to use [the site for] any of the prescribed uses as specified in the statute" and that "[n]either the Statute nor the Regulations in effect at the time of the grant or the Grant itself (conditions and stipulations) provide for BLM approval to change communications uses." (SOR at 2; see SOR at 7, 10, 14, 16.) The 1911 Act did not itself authorize individuals or corporations to use Federal lands, but rather authorized the Department of the Interior (and other agencies) to grant rights-of-way which allow individuals and corporations to use Federal lands for one or more of the specified purposes. See California Electric Power Co., 58 I.D. 607, 611 (1944). No regulation requiring BLM approval to change use of a site was needed because any unauthorized use was unlawful. As stated in the regulations in effect when R-4722 was issued: "Any use or occupancy of the lands of the United States without authority will subject the person occupying or using the land to prosecution and liability for Trespass." 43 C.F.R. § 2801.1-4 (1976); see 43 C.F.R. § 2801.3(a) (1976).

We reject Appellant's contention that BLM should have separately addressed his request for assignment and his application to amend. R-4722 authorized Channel 13 to use the site for the "[c]onstruction, operation and maintenance of a microwave site." BLM approved assignment of R-4722 to KTNV in 1989 based upon an application which stated that "the equipment, operation, control and location of the Rodman Mountain facility will be the same after assignment as before." In contrast, Appellant's application stated that he was in the business of "Two Way Radio Communication Sales and Service" and held other grants from BLM for this purpose. Thus, approval of the assignment so as to retain its terms under the 1911 Act would not authorize Appellant to conduct his business of two-way radio communications. In 1989, BLM no longer had authority under the 1911 Act

^{4/} The 1976 regulations did not define "substantial deviation," but the term was subsequently identified as including:

"(1) With respect to location, the holder has constructed the authorized facility outside the prescribed boundaries of the right-of-way authorized by the instant grant or permit.

"(2) With respect to use, the holder has changed or modified the authorized use by adding equipment, overhead or underground lines, pipelines, structures or other facilities not authorized in the instant grant or permit."

43 C.F.R. § 2803.2(b), as promulgated 45 Fed. Reg. 44518, 44534 (July 1, 1980).

to modify R-4722 to allow a use not previously authorized. See Donald R. Clark, 56 IBLA 167, 169 (1981). An authorization allowing Appellant to use the site for two-way radio communications could be issued only as an amended right-of-way under Title V of FLPMA. 43 U.S.C. § 1770(a) (1994). In 1989, BLM's only authority for amending R-4722 to change use, authorize use of additional land, and allow construction was Title V of FLPMA. BLM properly issued Appellant an amended right-of-way authorizing him, as he had agreed in the exhibit A stipulations he signed on May 1, 1989, to "Operate a two-way radio communications site, 25 feet by 30 feet, with the right to sublease to third parties."

We find no merit to Appellant's arguments that the James W. Smith cases require a contrary conclusion. James W. Smith is the holder of a 1911 Act right-of-way who has pursued a number of appeals to this Board claiming that he holds rights superior to other 1911 Act grant holders. See Gifford Engineering, Inc., 140 IBLA 252, 255-58 (1997). In his initial appeal the Board held that, under the regulations in effect when his grant was issued in 1959, the right-of-way was subject to reappraisal every 5 years and that secondary users of the site were subject to regulation by BLM. James W. Smith, 34 IBLA 146, 148-50 (1978). The Board's second decision, issued while an appeal of the first decision was pending in Federal district court, upheld BLM's appraisal of the rental value of the site, but agreed with Smith that, under the regulations, the increased annual rental of \$1,500 applied only in subsequent years. James W. Smith, 46 IBLA 233, 235-36 (1980). Nevertheless, the Board upheld BLM's decision to cancel the grant because it found Smith "in default by virtue of his longstanding practice of failing to remit correct annual rental." Id. at 236. Smith had ceased paying the previously appraised rate of \$400 per year and instead had paid the \$55 per year established when the right-of-way was issued. Id. On reconsideration, the Board examined only the issue whether section 506 of FLPMA, 43 U.S.C. § 1766 (1994), entitled Smith to notice and a hearing prior to cancellation of his right-of-way. Based upon other provisions of FLPMA and the regulations issued under its authority, the Board concluded that rights-of-way issued prior to FLPMA were not governed by the regulations and, therefore, 43 C.F.R. § 2803.4, implementing section 506, did not apply. James W. Smith (On Reconsideration), 55 IBLA 390, 396-97 (1978).

With regard to reappraisal of the annual rental, Appellant contends that, as a 1911 Act grant, the rate was fixed when R-4722 was issued. (Petition at 3; SOR at 8-14.) The evidence of record is to the contrary. The initial appraisal of the site concluded that the fair market rental value was \$1,200 per year but did not state that such rate was forever fixed, or that a single lump-sum rental payment was involved. Letters from BLM to Channel 13 dated July 22 and September 11, 1975, concerning payment of rentals due also report the annual rate without indicating that it was fixed. Nor does anything in the subsequent history of delinquent payments by Channel 13 suggest they were part of a fixed assessment.

Appellant's reliance on several documents also indicates that his claims are without merit. The regulations in effect when R-4722 was issued provided that the rental rate would "be the fair market value of

the permit, right-of-way, or easement, as determined by appraisal by the authorized officer." 43 C.F.R. § 2802.1-7(a) (1976); see 43 U.S.C. § 1764(g) (1988), 43 C.F.R. § 2803.1-2(a). Appellant points out that in Mountain States Telephone & Telegraph Co., 26 IBLA 393, 397, 83 I.D. 332, 333 (1976), the Board commented that under section 2802.1-7(a) "the charge is thus to be set for the entire grant." (SOR at 11-12.) He misreads the comment to mean a rental rate is unalterably fixed. In doing so, he disregards the decision's next sentence: "The established charge may be reviewed periodically and revised under section 2802.1-7(e)." Id. That subsection stated:

At any time not less than five years after either the grant of the permit, right-of-way, or easement or the last revision of charges thereunder, the authorized officer, after reasonable notice and opportunity for hearing, may review such charges and impose such new charges as may be reasonable and proper commencing with the ensuing charge year.

43 C.F.R. § 2802.1-7(e) (1976). Appellant also quotes Stanolind Oil & Gas Co., A-22537 (July 29, 1940), as showing that rental rates for 1911 Act grants were fixed at the time of issuance. (SOR at 10-11.) He fails to note, however, that the decision concerns a right-of-way issued prior to promulgation of a regulation allowing rental rates to be reappraised, as was the case when R-4722 was issued to Channel 13. 43 C.F.R. § 2802.1-7(e) (1976); see 4 Fed. Reg. 4524, 4526 (Nov. 8, 1939).

[3] The chief procedural difference in assessing rental rates before and after the passage of FLPMA is that currently 43 C.F.R. § 2803.1-2(c)(3)(ii) allows BLM to "estimate rental and collect a deposit in advance with the agreement that upon completion of a rental value determination, the advance deposit shall be adjusted according to the final fair market rental value determination," while 43 C.F.R. § 2802.1-7(e) (1976) required notice and an opportunity for a hearing and allowed new charges to be imposed only in the subsequent rental year. As in James W. Smith, 46 IBLA at 233, the Board has recognized in numerous decisions that the earlier regulation continues to apply to grants which were issued under the 1911 Act after revision of the regulation in 1954. See, e.g., Pacific Bell, 104 IBLA 66, 68 (1988), American Telephone & Telegraph Co., 57 IBLA at 215, (On Reconsideration), 59 IBLA at 343. Conversely, 43 C.F.R. § 2802.1-7(e) (1976) does not apply when a right-of-way has been conformed to FLPMA.

[4] Nor is Appellant entitled to a hearing before termination of his right-of-way. FLPMA provides:

Abandonment of a right-of-way or noncompliance with any provision of this subchapter, condition of the right-of-way, or applicable rule or regulation of the Secretary concerned may be grounds for suspension or termination of the right-of-way if, after due notice to the holder of the right-of-way * * * the Secretary concerned determines that any such ground exists and that suspension or termination is justified.

43 U.S.C. § 1766 (1994). The regulations provide that if rental "is not paid when due, and such default for nonpayment continues for 30 days after notice, action may be taken to terminate the right-of-way grant or temporary use permit." 43 C.F.R. § 2803.1-2(d); see also 43 C.F.R. § 3803.4(b) and (d). Even assuming arguendo that Appellant held his right-of-way under the 1911 Act and its implementing regulations, while he would be entitled to a hearing prior to BLM increasing the annual rental, Appellant would not be entitled to a hearing prior to cancellation for failure to pay rent because equivalent authority was provided by 43 C.F.R. § 2802.1-7(d) and 43 C.F.R. § 2802.3-1 (1976).

We conclude that BLM properly conformed R-4722 to FLPMA when it amended the grant to allow Appellant to use the site for two-way radio communications. As a result, the right-of-way became subject to the regulations issued under FLPMA and Appellant was obligated to timely pay the estimated rental of \$5,000 per year. For the same reason Appellant was not entitled to a hearing before BLM could establish his rental rate based on the February 3, 1994, appraisal. The requirement to pay the difference between estimated and appraised rental values is not a prohibited imposition of a retroactive rental. Michael D. Dahmer, 132 IBLA 17, 19 (1994); Oregon Broadcasting Co., 119 IBLA 241, 242-43 (1991), and cases cited. Finally, BLM properly terminated the right-of-way, after providing notice and an opportunity to remedy the deficiency, without a hearing. Roy L. Parish, 114 IBLA 336, 338 (1990); D.R. Johnson Lumber Co., 106 IBLA 379, 386 (1989); Aztec Energy Corp., 98 IBLA 372, 376 (1987).

[5] One aspect of the procedure BLM followed, however, was deficient. BLM first notified Appellant by the decision on appeal that an appraisal of the fair market rental value of his site had established a rate \$6,800 per year. BLM's standard practice after an appraisal has been approved is to issue a decision informing the right-of-way holder of the rental rate. See, e.g., D.R. Johnson Lumber Co., supra, at 382. Although not entitled to a hearing, the holder of a right-of-way under FLPMA is entitled to be notified of the decision establishing a rental rate, provided a copy of the appraisal, and given an opportunity to appeal. The record does not indicate that such a decision issued after the appraisal of Appellant's site was approved on February 3, 1994. Appellant could have disputed the decision establishing the rental rate in this appeal; however, without being provided a copy of the appraisal he would not be in a position to make an informed challenge to the appraisal. Gifford Engineering Inc., supra, at 265 (1997). Thus, in fairness to Appellant, we are not persuaded to affirm that portion of the decision holding him responsible for payment of past rentals at the rate of \$6,800 per year. Accordingly, we modify the decision to hold that Appellant owes \$10,000 in rent for the years 1993 and 1994, plus interest. Despite several notices from BLM, including the notice to show cause, Appellant has not paid rent since January 7, 1992. Thus, having failed to pay the \$5,000 per year estimated rental lawfully assessed under 43 C.F.R. § 2803.1-2(c)(3)(ii), we find no basis to suspend BLM's decision to terminate the right-of-way and require Appellant to remove his equipment from the site to await further action on the rental rate.

Except to the extent that they have been expressly or impliedly addressed herein, all other motions and arguments made by Appellant have been considered and rejected as contrary to the facts or law or immaterial. See National Labor Relations Board v. Sharples Chemicals, 209 F.2d 645, 652 (6th Cir. 1954); Glacier-Two Medicine Alliance, 88 IBLA 133, 156 (1985).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the December 8, 1994, decision of the District Manager, California Desert District Office, BLM, is affirmed as modified.

Gail M. Frazier
Administrative Judge

I concur:

David L. Hughes
Administrative Judge

